United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-7112

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

EDWARD KENNIS and MARION KENNIS,

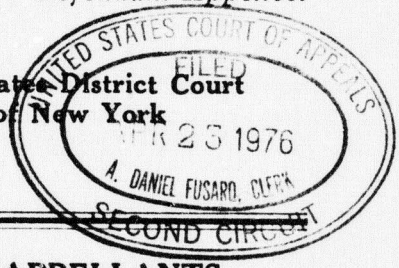
Plaintiffs-Appellants,

P/s

against

WALLENPAUPACK LAKE ESTATES,

Defendant-Appellee.



On Appeal from the United States District Court For the Southern District of New York

BRIEF FOR PLAINTIFFS-APPELLANTS

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Cases Cited

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Statement

As the memorandum-order appealed from herein and included in the appendix shows, plaintiffs purchased property in Pennsylvania from defendant, a joint venture. They commenced an action for breach of contract, alleging diversity jurisdiction, and moved for summary judgment thereon.

As the order on said motion shows, included in the appendix herein, the court held that there were "serious questions of fact affecting both jurisdiction and the merits."

Subsequently, with no additional facts adduced (opinion, footnote 1) the court dismissed for lack of diversity jurisdiction on the eve of trial (opinion, next to last paragraph).

As said paragraph shows, plaintiffs had informally advised the court of their intention to also base jurisdiction under the "Interstate Land Sales Full Disclosure Act", Title 15 U.S.C.A.

Subsequently, along with a motion for leave to reargue the motion to dismiss the complaint, plaintiffs moved for an order pursuant to Rule 15(a) of the Federal Rules permitting them to serve and filed an amended complaint. The motion, affidavit, and proposed amended complaint with exhibits are included in the appendix.

By single memorandum-order, included in the appendix, the motions for leave to reargue and to amend were denied.

POINT I

The motion to dismiss for lack of diversity jurisdiction was granted prematurely.

Even in those cases where the appellate courts have sustained dismissal for lack of diversity involving an unincorporated association because of the citizenship of one of the members destroying diversity, the said appellate court has been willing to examine the record to be certain that some member of the unincorporated association does actually destroy diversity. *Baer* v. *United Services Automobile Assn.,* 2 Cir., 503 F. 2d 393, note 5.

The plaintiff has the burden of proving diversity jurisdiction. *Arnold* v. *Troccoli,* 2 Cir., 311 F. Supp. 812; *Trianes* v. *Schulte,* S.D.NY., 311 F. Supp. 812. As the

motion for leave to amend shows, plaintiffs herein were endeavoring to meet that burden by the evidence. In denying the motion they were deprived of the opportunity to meet that burden.

POINT II

There is diversity jurisdiction herein.

In its original memorandum-order, note 5, citing New York law the court correctly held that a joint venture may be sued.

Plaintiffs are well aware of that apparently fixed, if ante-deluvian body of law going back to *Great Southern Fire Proof Hotel Co.* v. *Jones,* 177 U.S. 449, 20 S. Ct. 690, 44 L.Ed. 842 which makes unincorporated associations that which they really are not and removes them from the federal courts when, in today's milieu, they have far more place there than most individuals; *Baer* v. *United Services Automobile Association, supra;* 3 A. J. Moore, Federal Practice Par. 17.25, at 862-864 (Supp. 1973). (Incidentally, on the last page thereof, the Supreme Court expressly refrained from ruling on the relevancy of the residence of the individual partners of the named defendants, such as the case herein).

However, it is well settled that limited partners cannot destroy diversity jurisdiction, *Colonial Realty Corp.* v. *Bache & Co.,* 2 Cir. 358 F.2d 178, 183-184.

A well reasoned and researched opinion by district court Judge MacMahon in *Jones Knitting Corporation* v. *A. M. Pullen & Co.,* 50 F.R.D. 311 shows that even general partners can be eliminated to preserve diversity.

Be that as it may, even allowing for the correctness of the law that permits a single nameless individual to de-

stroy diversity jurisdiction, plaintiffs are not moving out horizontally against more individuals who are members of the unincorporated association. Rather, it is defendant that is endeavoring to raise an individual vertically, to put him on the same horizontal plane as the members of the joint venture sued, i.e. a Pennsylvania limited partnership and a Delaware non-profit corporation (paragraph 3 of proposed amended complaint).

If the case of *United Steelworkers* v. *R. H. Bouligny, Inc.*, 382 U.S. 145, 86 S. Ct. 272, 15 L. Ed. 2d 217 "appears to have been intended to truncate any further judicial enlargement of the clear language of 28 U.S.C.A. Sec. 1332(c)," *Baer* v. *United Services Automobile Association*, supra, p. 396, it is submitted that the truncation should be horizontal, not vertical.

If limited partners can be eliminated, *Colonial Realty Corp.* v. *Bache & Co.*, supra, to preserve diversity jurisdiction, it is submitted that partners (even general partners) of partners should be eliminated, especially those whom the evidence would show (Point I, supra) are even less than limited partners insofar as the joint venture is concerned.

POINT III

Leave to amend was improperly denied.

The court never actually decided that it would not have federal jurisdiction under the proposed amended complaint (paragraph 2 of memorandum-order of March 19, 1976). It only denied leave because the statute gives jurisdiction to both state and federal courts.

It is submitted that such denial was improper, *Middle Atlantic Utilities Co.* v. *S. M. W. Development Corp.*, 2 Cir. 392 F.2d 380.

The Interstate Land Sales Full Disclosure Act gives the buyer discretion as to forum, not the court, it is respectfully submitted.

But in any event, it is submitted that the court misused any discretion it might have had when, after allowing plaintiffs to make complete preparation right up to the eve of trial based upon its own determination that a question of fact existed, it deprived plaintiffs who have been patiently paying out monthly carrying charges on the property herein (paragraph 23 of proposed amended complaint), waiting for their day in court, of an opportunity to be heard on the merits.

Respectfully submitted,

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37 —Affidavit of Service by Mail

United States Court of Appeals
for the Second Circuit

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

Edward Kennis and Marion Kennis
Plaintiffs-Appellants
against
Wallenpaupack Lake Estates
Defendant-Appellee
On Appeal from the United States District Court for the Southern District of New York

State of New York, County of New York, ss.:

Raymond J. Braddick, agent for Robert P. Whelan Esq., being duly sworn deposes and says that he is the attorney for the above named Plaintiffs-Appellants herein. That he is over 21 years of age, is not a party to the action and resides at Levittown, New York

That on the 23rd. day of April, 1976, he served the within Brief and Appendix

upon the attorneys for the parties and at the addresses as specified below

Benjamin B. Wesley Esq.
Attorney for efendant-Appellee
86-14 Forest Parkway
Woodhaven, New York 11421

by depositing 3 copies of each
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 23rd.
day of April, 1976

Raymond J. Braddick

Roland W. Johnson,
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977